84-184

No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMS PIPE LINE COMPANY,
Petitioner

v.

FARMERS UNION CENTRAL EXCHANGE, INC., *et al.*,
FEDERAL ENERGY REGULATORY COMMISSION, and
UNITED STATES OF AMERICA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August 2, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals has improperly restricted the authority of the Federal Energy Regulatory Commission to adopt its own methodology for evaluating the reasonableness of oil pipeline common carrier rates?

2. Whether Williams Pipe Line Company has been denied procedural due process by the Circuit Court's affirmance of FERC's finding, in a general industry-wide rulemaking proceeding, that the purchase price paid by Williams in 1966 would not be considered for ratemaking purposes where Williams had received no notice of any such issue?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the Court of Appeals, whose judgment is sought to be reviewed, were as follows:

Farmers Union Central Exchange, Inc.
Farmland Industries and its subsidiary, CRA, Inc.
Kerr-McGee Refining Corporation
Land O'Lakes, formerly Midland Cooperatives, Inc.
National Cooperative Refining Association
Williams Pipe Line Company
Association of Oil Pipe Lines
Phillips Pipe Line Company
ARCO Pipe Line Company
Mid-America Pipeline Company
Marathon Pipe Line Company
Buckeye Pipe Line Company
Hydrocarbon Transportation, Inc.
Texas Eastern Transmission Corporation
Belle Fourche Pipe Line Company
Getty Pipeline, Inc.
Sun Pipe Line Company
Federal Energy Regulatory Commission
United States of America

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Williams Pipe Line Company (Williams), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered March 9, 1984 in proceedings styled *Farmers Union Ce..tral Exchange v. Federal Energy Regulatory Commission and the United States of America*, No. 82-2412 (*Farmers Union II*). Williams is an oil pipeline common carrier and participated in the proceedings before the Court of Appeals both as a petitioner and as an intervenor-respondent.

OPINIONS BELOW

The decision of the Court of Appeals sought to be reviewed has been reported as *Farmers Union Central Exchange v. Federal Energy Regulatory Commission*, 734 F.2d 1486 (1984). The decision of the Federal Energy

Regulatory Commission (FERC) that was reviewed by the Court of Appeals is *Williams Pipe Line Company*, 21 FERC (CCH) ¶ 61,260 (November 30, 1982). Copies of both decisions are included in a separately bound Appendix.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. §§ 1254 and 2350. The decision of the Court of Appeals was entered March 9, 1984. Petitions for rehearing filed by Texas Eastern Transmission Corporation, the AOPL and Williams with respect to certain issues were denied by the Court of Appeals on May 4, 1984.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the due process clause of the Fifth Amendment to the United States Constitution. It also involves sections of the Interstate Commerce Act (49 U.S.C. §§ 1, *et seq.*) and the Administrative Procedure Act (5 U.S.C. §§ 551, *et seq.*). The text of the pertinent parts of each is set forth in the separately bound Appendix filed simultaneously with this petition.

STATEMENT OF THE CASE

A. Proceedings Prior to the FERC Proceedings

These proceedings began over 12 years ago before the Interstate Commerce Commission (ICC) when that agency had regulatory jurisdiction over oil pipeline rates. After lengthy hearings before that Commission, Williams' rates were twice found to have been just and reasonable under that agency's standard. *Petroleum Products, Williams Bros. Pipe Line Company*, 351 I.C.C. 102 (1975); *Petroleum Products, Williams Bros. Pipe Line Company*, 355 I.C.C. 479 (1976).[1]

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[1] The standard applied by the ICC to Williams had been used by that Commission in prescribing rates for Williams' predecessor,

The ICC decisions were appealed to the United States Court of Appeals for the District of Columbia Circuit by the group of shipper complainants (Mid-Continent Shippers). Before that appeal was argued, the Department of Energy Organization Act was passed (42 U.S.C. §§ 701, *et seq.*), transferring from the ICC to the FERC the federal regulatory authority over oil pipeline rates. As a result, FERC was substituted for the ICC as the respondent agency before the Court of Appeals. The FERC took no position as to the merits of the ICC's decisions, but instead urged that the court remand the case to it so that FERC might form its own industry-wide principles for evaluating the reasonableness of oil pipeline rates. The Court of Appeals granted that request in its decision in *Farmers Union Central Exchange v. FERC*, 584 F.2d 408 (D.C. Cir. 1978) (*Farmers Union I*). Williams' petition for certiorari was denied by this Court in *Williams Pipe Line Company v. FERC*, 439 U.S. 995 (1978).

In response to the remand order of the Court of Appeals in *Farmers Union I*, FERC commenced its own further proceedings. Those proceedings were separated into two phases, the first of which (Phase I) was the subject of the FERC decision which led to the further Court of Appeals decision (*Farmers Union II*) that is the subject of this petition. The stated object of Phase I of the FERC proceedings was the development of generic ratemaking criteria for all oil pipelines subject to FERC's regulatory jurisdiction. Phase I was to be followed by Phase II proceedings, dealing with the application of the Phase I criteria to the specific rates of Williams challenged by the Mid-Continent Shippers.

Great Lakes Pipe Line Company, over thirty years before in Petroleum Rail Shippers Ass'n. v. Alton & S. R.R., 243 I.C.C. 589 (1941). *See also*, Trans Alaska Pipeline Rate Cases, 436 U.S. 591, 636, n.13 (1978), where this Court recognized the ICC's use of a valuation rate base for oil pipelines.

B. Proceedings Before the FERC

The Phase I proceedings before the FERC developed a record of thousands of pages of prepared testimony and exhibits presented by over 50 witnesses. An official transcript of over 8,000 pages resulted from 59 hearing days before the FERC Administrative Law Judge. In addition, there were two oral arguments before the members of the Commission.

On November 30, 1982, FERC's decision was issued. In a lengthy opinion, FERC analyzed the pros and cons of the contentions of the parties as to the ratemaking criteria it should adopt, and set out its own evaluation of the industry, its statutory responsibilities, and the reasons why particular ratemaking regulatory approaches were or were not, in its view, appropriate. It concluded that for oil pipelines a light rather than a heavy regulatory hand was appropriate (App. B-65, B-66; 21 FERC at 61,585, 61,586),[2] thereby implicitly endorsing the regulatory approach that had been used by the ICC for this industry for over 40 years. Like the ICC, the FERC decided to continue the use, for rate base purposes, of pipeline valuations prepared by the Commission (and previously by the ICC) under Section 19a of the Interstate Commerce Act (49 U.S.C. § 19a) (App. B-233 to B-235; 21 FERC at 61,632).

While Williams-specific issues were to be dealt with in a later Phase II, FERC inexplicably made one finding in its Phase I decision on a Phase II issue of immense importance to Williams. That issue was the ratemaking treatment to be given to the price Williams had paid in 1966 for the assets of the former Great Lakes Pipe Line Company. FERC held that Williams' purchase price was

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[2] The appendix references are to sections of the separately bound Appendix.

to be given no consideration whatsoever for ratemaking purposes even though that issue was not then before it (App. B-243; 21 FERC at 61,636).

C. Proceedings Before the Court of Appeals

FERC's Phase I decision was the subject of several petitions for review brought in the Court of Appeals pursuant to the provisions of 28 U.S.C. §§ 2321(a), (b) and 28 U.S.C. §§ 2341(2), (3). The ratemaking approach adopted by FERC was challenged by the Mid-Continent Shippers and by the Department of Justice, each of whom argued that utility-type, original cost ratemaking was the only approach that could properly be adopted by FERC for the oil pipeline industry. On behalf of the industry, the AOPL appealed from FERC's treatment of two limited issues, but did not challenge FERC's conclusion as to its overall ratemaking approach. Williams also did not challenge FERC's overall approach but, as a petitioner before the Court of Appeals, raised two additional issues. First, Williams argued that FERC had erred in its treatment of Williams' purchase price in its Phase I decision. Second, Williams claimed that FERC had improperly failed to provide that its new ratemaking standard would not be applied retroactively to rates established under a different standard.

The Court of Appeals' decision essentially adopted the contentions of the Department of Justice and the Mid-Continent Shippers, while it substantially rejected the positions advanced by FERC, AOPL, Williams and other members of the oil pipeline industry. While giving occasional lip service to the proposition of agency discretion and the limited scope of its review of FERC's conclusions (App. A-30, A-31), the court did everything but specifically mandate to the FERC, in *haec verba*, that FERC should utilize utility-type original cost ratemaking for this non-utility industry (App. A-33). Flatly stating that cost-based ratemaking was to be used absent a

showing of sufficient reasons for departure therefrom, the Court of Appeals concluded that FERC's Phase I decision had not made the requisite showing (App. A-34).

Of particular relevance to the questions sought to be reviewed, the Court of Appeals concluded that FERC's overall approach contravened its statutory directive to determine whether rates are "just and reasonable" (App. A-30). This failure was held to have resulted (1) from FERC's establishment of maximum rate ceilings above the "zone of reasonableness" required by the statute; (2) from FERC's failure to specify in detail how "non-cost" factors might justify such high maximum rate levels; (3) from FERC's erroneous belief that the climate of opinion in 1906 "shaped a congressional purpose to impose only very lighthanded rate regulation on the oil pipelines"; and (4) from FERC's improper reliance on its findings that oil pipeline rate regulation was unimportant to consumers at large and that regulation for this industry was best left to market forces (*id.*).

The Court of Appeals opinion gave but limited attention to the two issues raised by Williams. Concerning Williams' claim that FERC should have made a specific finding that its new ratemaking standard would not be applied retroactively, the decision contained no extended discussion, but indicated agreement with Williams on the issue. Thus, the Court of Appeals noted that this phase of the case constituted rulemaking, and pointed out that the definition of "rule" under the Administrative Procedure Act included "the approval or prescription *for the future* of rates" (emphasis added) (App. A-25). Even more significantly, in discussing potential problems that could arise from a change to a new regulatory approach, the court specifically affirmed the principle stated by the *Farmers Union I* court that the solution to reliance by the pipeline industry on the ICC's return on valuation approach was "not to perpetuate that reliance but to end it *prospectively, without allowing reparations based on*

its occurrence in the past" (emphasis added) ***Farmers Union I,*** 584 F.2d at 419; ***Farmers Union II,*** App. A-66.

As to Williams' challenge to FERC's treatment of its 1966 purchase price, the court's opinion devoted but a single paragraph and three footnotes. On the critical point of whether Williams had been given proper notice that its purchase price was at issue in Phase I, the court specifically found that Williams had in fact received such notice (App. A-87, n.78). As shall subsequently be shown, that conclusion relied solely on two documents that compel precisely an opposite conclusion. Other arguments of Williams as to FERC's treatment of its purchase price were rejected with virtually no discussion, with several characterized as frivolous.

REASONS FOR GRANTING THE WRIT

I. THE FERC IS EMBARKING UPON A NEW ERA IN THE REGULATION OF THE OIL PIPELINE COMMON CARRIER INDUSTRY; FOR THAT REASON ALONE THE WRIT SHOULD BE GRANTED.

The FERC decision reflects the effort of that agency to develop its own approach to the regulation of oil pipeline rates. The opportunity to do so within the framework of this case was granted FERC by the Court of Appeals in *Farmers Union I.* That court remanded the case, previously twice-decided by the ICC, to give FERC, in response to FERC's specific request, the opportunity to begin its new "regulatory duties in this area with a clean slate" (584 F.2d at 421). Thus, the November 30, 1982 decision of FERC and the March 9, 1984 decision of the Court of Appeals involve matters of major significance to an industry that is the major transporter of this nation's supply of crude petroleum and refined petroleum products. Indisputably this industry is of extreme importance to the economic well-being of the nation.

Moreover, it is not only the importance of this industry to the nation that calls for granting certiorari in this

case. This Court should take this case because it involves important questions of statutory interpretation and of the role of the judiciary in administrative appeals, and, for Williams, an important issue of procedural due process. This is a case where the Court of Appeals for the District of Columbia Circuit has once more reached well beyond its proper judicial review role and, instead, has acted as a super-agency.

As will be shown, the Court of Appeals has indulged in a selective, contorted view of the Interstate Commerce Act and its legislative history that results in an improper conclusion as to the scope of administrative discretion to approve rates under the Act. By so doing, the court has ignored clear evidence of Congressional intent that the "just and reasonable" standard for common carrier rates under the Interstate Commerce Act was not intended by Congress either in the past or the present to permit rates measured only by the restrictive original cost standards commonly imposed today by regulators, including FERC, on franchised public utilities.

The court has also ignored that FERC's use of a valuation rate base, not only accords with prevailing legal concepts at the time oil pipelines were first made subject to the Interstate Commerce Act, but that such use is in accord with clear evidence of a continuing Congressional intent. That intent was specifically enacted into law in 1913 in the Valuation Act (49 U.S.C. § 19a) and has been subsequenlty reaffirmed on numerous occasions.[3]

Finally, the Court of Appeals has turned the teaching of this Court in the *Hope*[4] case on its head. Where the Court, in *Hope*, freed regulators from strict requirements

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[3] Significantly and without explanation, the Court of Appeals does not even discuss the legislative history, referred to hereinafter, of § 19a of the Interstate Commerce Act prior and subsequent to its enactment.

[4] FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

as to ratemaking methodology, the Court of Appeals would hold FERC to the use of a single methodology—original cost. The Court of Appeals has plainly confused what is permissible with what is mandatory.

Over the course of this case, two different federal agencies have reached similar conclusions as to how to regulate oil pipeline rates. The decisions of both agencies have been rebuffed by the Circuit Court. In the first instance, *Farmers Union I*, the overruling of the agency (ICC) was at least in part because the new agency (FERC) wanted its chance. The Court of Appeals in *Farmers Union I* claimed to be giving it that chance—the freedom to write on a clean slate (584 F.2d at 421).

Yet, when the second agency, after great effort, published its conclusions, the result was the same—another rebuff. What was merely hinted at as only an option in the *Farmers Union I* decision, but is now virtually mandated in the decision in *Farmers Union II*, is that this Court of Appeals wants to have *its* ideas of rate regulation imposed on this industry and will not approve an agency decision that uses a different approach. At issue is whether the policy as to how this industry's rates are to be regulated is to be decided by FERC or by the Court of Appeals for the District of Columbia Circuit.

In the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court granted a petition for a writ of certiorari to review a Court of Appeals decision involving a new area rate-making approach of the Federal Power Commission, FERC's predecessor. The Court stated its reason for granting the petition in that case, as follows (*id.* at 755):

> Because these proceedings began a new era in the regulation of natural gas producers, we granted certiorari and consolidated the cases for briefing and extended oral argument.

When this Court denied Williams' petition for certiorari after the *Farmers Union I* decision, FERC had not begun its consideration of its own ratemaking approach. Now, after lengthy proceedings it has done so, but the Court of Appeals has, nevertheless, expressed its strong criticism of that approach. As in the *Permian* case, an industry of crucial importance to the economy of the nation is involved. As in *Permian*, "a new era in the regulation" of oil pipeline rates is beginning, and the shape of that era and the freedom with which FERC will be permitted to deal with that new era are at stake. The reasons that supported the granting of certiorari in *Permian* are present here: the requested writ should issue.

II. THE COURT OF APPEALS HAS IMPROPERLY RESTRICTED THE SCOPE OF FERC'S AUTHORITY TO ARRIVE AT ITS OWN METHODOLOGY FOR EVALUATING THE REASONABLENESS OF OIL PIPELINE COMMON CARRIER RATES.

A. *Preliminary Comments.*

Although oil pipeline common carrier rates have been subject to federal regulation under the Interstate Commerce Act since 1906, this Court has never had occasion to consider the regulatory approach used by the ICC or the FERC in evaluating the reasonableness of that industry's rates.[5] In fact, apart from the various phases of the present protracted case, there has been little formal litigation concerning oil pipeline rates in any forum, administrative or judicial.

This relative lack of litigation over a span of almost eighty years must be attributed at least in part to the ICC's conclusion that a light regulatory hand was appro-

[5] The Trans Alaska Pipe Line Rate Cases, *supra*, decided by this Court in 1978, did not involve review of the ICC's oil pipeline ratemaking criteria, although the Court's opinion included recognition of that Commission's customary use of a return-on-valuation methodology (436 U.S. at 636, n.13).

priate for this industry and to its use of a guideline return-on-valuation, thereby giving weight to both original cost factors and to the value of the assets dedicated to carrier service. *Reduced Pipeline Rates and Gathering Charges*, 243 I.C.C. 115 (1940), 272 I.C.C. 375 (1945); *Petroleum Rail Shippers Assn. v. Alton & S. R.R.*, 243 I.C.C. 589 (1941); *Minnelusa Oil Corp. v. Continental Pipe Line Co.*, 258 I.C.C. 41 (1944). While "if it ain't broke, don't fix it" may not be a legal maxim, this lack of litigation and the lack of Congressional action to interfere with or modify the ICC's regulatory approach when requests therefor were made would, at the minimum, indicate that the past regulatory approach has served the nation well and that it has been consistent with Congressional desires.

As previously noted, the FERC asked the Court of Appeals for the opportunity to develop its own ratemaking approach. That request was granted and the Court of Appeals gave FERC permission to "write on a clean slate." *Farmers Union I*, 584 F.2d at 421. It is significant that FERC was the successor to the former Federal Power Commission (FPC), that was given the additional responsibility of oil pipeline regulation under the Interstate Commerce Act, a statute with which it had no prior experience. Thus, FERC began its existence as an agency whose rate regulatory background and experience was almost entirely in the field of strictly regulated, franchised, public utilities such as electric generating companies and natural gas transmission companies. Therefore, its rate experience at that time was limited to the use and application of original cost-based ratemaking, at least during the period since this Court's decision in the *Hope* case, *supra*.

FERC admittedly had a "strong predisposition" to extend the same, utility-type regulatory approach to this additional industry placed under its jurisdiction (App. B-191; 21 FERC at 61,619). However, in this case, FERC concluded that a different and far less restrictive

approach for the oil pipeline industry was desirable. That approach would continue use of the valuation rate base used by the ICC and would permit returns on that rate base measured by returns earned by the more successful sectors of the economy (App. B-275; 21 FERC at 61,645). Thus, this case, which is unusual in many respects, involves the novel situation where two different federal agencies of divergent backgrounds have each considered how to regulate the rates of the oil pipeline industry and have arrived at similar regulatory approaches. The opinion of the Court of Appeals in *Farmers Union II*, which Williams now asks this Court to review, would virtually compel FERC to adopt a method for which the Court of Appeals has an obvious "strong predisposition," a method which—after thousands of pages of record, many days of hearings, lengthy briefs, and two oral arguments—the Commission rejected.

B. *The Court of Appeals Decision.*

The Court of Appeals would impose on this industry its view that all rate regulation, no matter what the nature of the industry, should be utility-type, original cost-based. As we shall demonstrate hereinafter, the Court of Appeals' opinion is based upon an erroneous interpretation of the Interstate Commerce Act and of the scope of agency discretion under that Act. Moreover, by its opinion, the Court of Appeals has again intruded into the area of agency discretion far beyond the proper scope of its judicial review function despite repeated admonitions from this Court. In so doing, the court has improperly sought to impose its views on economic and regulatory policy on the agency assigned that task by the Congress. Rewriting the Interstate Commerce Act is the function of the Congress, not that of the Court of Appeals. Making policy determinations under that Act with respect to the regulation of oil pipeline rates has been delegated by the Congress to the FERC, not the Court of Appeals. However, by its opinion in this case, the Court of Appeals has usurped the responsibilities of both the Congress and the FERC.

C. *The Court of Appeals' Incorrect Interpretation of the Interstate Commerce Act's Rate Standards.*

The Court of Appeals' conclusion that the FERC decision "contravenes" the statutory directive to determine whether rates are "just and reasonable" was a principal reason for its overruling of that decision and for its remanding of the case for further consideration (App. A-50). Critical, in turn, to that ultimate conclusion was the Court's finding that "the legislative history of the Hepburn Act betrays FERC's belief that 'the climate of opinion' in 1906 shaped a Congressional purpose to impose only very light-handed rate regulation on the oil pipelines" (App. A-30). This issue—the Congressional intent as to the degree of oil pipeline rate regulation to be applied by FERC (and previously by the ICC)—is one of fundamental importance in this proceeding. Its resolution will determine the future course of rate regulation of this important industry.

It is important to note that, in seeking support for its narrow interpretation of the "just and reasonable" standard of the Interstate Commerce Act ("ICA"), the Court of Appeals relied on decisions of this Court, none of which involved that language in that Act (App. A-32 to A-35). All but one of the cases cited by the court involved *other* types of regulated industries regulated under *other* regulatory statutes (*id.*).[6] It is from those cases that the Court of Appeals panel derives what it calls "established ratemaking principles" (App. A-33) which it would apply to oil pipelines as if they were public utilities.

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[6] The only decision of this Court involving the Interstate Commerce Act among those cited by the Appeals Court in that section of its opinion was the Trans Alaska Pipeline Rate Cases, *supra*. That case, however, did not involve interpretation of the "just and reasonable" standard of the ICA. It is to be noted, nevertheless, that in another phase of that case, this Court upheld the ICC's policy determination to apply to oil pipelines an Interstate Commerce Act standard as to allowable interest on refunds by railroads. Mobil Alaska Pipeline Co. v. United States, 434 U.S. 949 (1977).

Chief among the "principles" so found by the panel is one described in a quotation from *Mobil Oil Corp. v. FPC*, 417 U.S. 283 (1974), at 308, that "each deviation from cost-based pricing [*must be*] found not to be unreasonable and to be consistent with the Commission's [statutory] responsibility" (emphasis added). Based on this quotation, taken from a case arising under the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*, the Court of Appeals stated (App. A-33):

> Thus, when FERC chooses to refer to non-cost factors in ratesettting, it must specify the nature of the relevant non-cost factor and offer a reasoned explanation of how the factor justifies the resulting rates.

The thrust of the latter statement, notwithstanding purported recognition elsewhere in the opinion that the "just and reasonable" standard is not precise (App. A-31), is that the Court of Appeals would hold FERC, as a matter of law, to utility-type, cost-based ratemaking for oil pipelines absent an explanation, satisfactory to the court, justifying consideration of other factors.

The reliance of the Court of Appeals on the decision of this Court in *Mobil Oil, supra*, to support its ultimate conclusion is misplaced even for public utilities, much less the oil pipeline industry. The quotation from *Mobil Oil* relied upon by the Court of Appeals contains words inserted in brackets that twist the meaning of this Court's actual words. The court changed the phrase "was found" to the phrase "must be found." The complete statement of this Court and its context reads as follows (417 U.S. at 308-9) (emphasis added):

> Applying these criteria, *Permian* reversed the Court of Appeals and sustained the Commission's order, although noting that the Commission had not adhered rigidly to a cost-based determination of rates, much less to one that based each producer's rates on

his own costs.* Each deviation from cost-based pricing *was found* not to be unreasonable and to be consistent with the Commission's responsibility to consider not merely [417 US 309] the interests of the producers in "maintain[ing] financial integrity, attract[ing] necessary capital, and fairly compensat[ing] investors for the risks they have assumed," but also "the relevant public interests, both existing and foreseeable." 390 US, at 792, 20 L Ed 2d 312. "The Commission's responsibilities necessarily oblige it," the Court said, "to give continuing attention to values that may be reflected only imperfectly by producers' costs; a regulatory method that excluded as immaterial all but current or projected costs could not properly serve the consumer interests placed under the Commission's protection." *Id.*, at 815, 20 L Ed 2d 312;

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* Indeed, in addition to its general approval of such an approach, see 390 US, at 814-815, 20 L Ed 2d 312, the Court in Permian Basin listed each of the noncost factors used by the Commission and approved them. See id., at 815 n.98, 20 L Ed 2d 312.

The Court of Appeals thus converted a statement of fact by this Court in a Natural Gas Act case into a purported directive and on that constructed directive built its theory as to what is required by the Interstate Commerce Act's "just and reasonable" standard. In fact, the Court of Appeals is plainly of the view that this proposition is applicable to *any* rate-regulated entity.

Yet, no cases under the Interstate Commerce Act support the Court of Appeals' conclusion that these "principles," even if they exist under the Natural Gas Act, are applicable to common carrier oil pipelines. Moreover, the court's reliance upon interpretations of "just and reasonable" in cases arising under other statutes as a basis for determining the meaning of that phrase under the Interstate Commerce Act runs counter to the ruling of this Court in a recent case arising under section 210 of the Public Utility Regulatory Policies Act of 1978

("PURPA"), 16 U.S.C. § 824a, *American Paper Institute v. American Electric Power Service Corp.*, —— U.S. ——, 103 S.Ct. 1921 (1983). In that case, this Court rejected a similar attempt to transfer the meaning of a phrase from one statute to another, stating (103 S.Ct. at 1928):

> Simply on the basis of the statutory language, we would be reluctant to infer that Congress intended the terms "just and reasonable," which are frequently associated with cost-of-service utility ratemaking, . . . to adopt a cost-of-service approach in the very different context of cogeneration and small power production by nontraditional facilities.[7]

Ironically, in *Farmers Union I*, *supra*, a different panel of the same Court of Appeals expressed a reluctance very similar to that expressed by this Court in the *American Paper Institute* case. After noting the limited degree of regulation of oil pipelines under the Interstate Commerce Act, the *Farmers Union I* panel said (584 F.2d at 413):

> For this reason, we may infer a congressional intent to allow a freer play of competitive forces among oil pipeline companies than in other common carrier industries and, as such, we should be especially loath uncritically to import public utilities notions into this area without taking note of the degree of regution and of the nature of the regulated business.

The panel in *Farmers Union II* attempted to reconcile its own opinion with this statement in *Farmers Union I* (App. A-47, n.51). In its attempt, however, it claimed no disagreement with the statement but, to the contrary, said that it expressed a principle, "followed here" (*id.*). The principle said to have been "followed here" was

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[7] Moreover, even as to a cost-of-service approach, this Court has recently recognized that a particularized adherence to such a regulatory regime has proved impractical in the past. *Public Serv. Comm'n v. Mid-Louisiana Gas Co.*, —— U.S. ——, 103 S.Ct. 3024 (1983).

that neither original-cost based utility type regulation nor valuation regulation "suggested by the Valuation Act" must *necessarily* be used (*id.*). Putting aside the fact that the Valuation Act (§ 19a of the Interstate Commerce Act, 49 U.S.C. § 19a) does far more than "suggest" the use of a valuation rate base, the Court of Appeals' decision in this case can hardly be described as following the principle referred to. The *Farmers Union II* panel's plain view is that cost-based pricing *must* be used and its outright rejection of the use of a valuation rate base contradicts rather than follows the statement in *Farmers Union I*. It is the *Farmers Union II* court that has uncritically imported "public utilities notions into this area without taking note of the degree of regulation and of the nature of the regulated business."

The Court of Appeals also sought to justify its restrictive conclusion on portions of the legislative history of the Hepburn Act of 1906. The court's reliance on that legislative history is unwarranted. At the time of the Hepburn Act, the general ratemaking approach to "other common carriers" under the Interstate Commerce Act was the fair return on the fair value of the property approach set forth by this Court in *Smyth v. Ames*, 169 U.S. 466 (1898). Thus, a Congressional intent in 1906 to subject oil pipelines to the same general ratemaking standards of "other common carriers" *supports* rather than refutes the methods used by both the FERC and the ICC.

Moreover, the fact that value was an intended ratemaking consideration at that time was subsequently confirmed by the legislative history and passage of the Valuation Act of 1913, section 19a of the Interstate Commerce Act (49 U.S.C. § 19a, 62 Cong. Sess. III, c. 92, 37 Stat. 701). The Valuation Act *compels* Commission determination of the valuation of oil pipeline assets and provides that such a valuation figure shall be *prima facie evidence* of the value of the carrier's property in all proceedings under the Act (*id.* at § 19a(i)). The Court of

Appeals' opinion, while highly critical of valuations of oil pipeline properties (App. A-18), fails even to mention the fact that they are *required* (not merely suggested) *by statute.* Nor is there room for any doubt that the statute means what it says and that ratemaking is included among the proceedings covered by its terms.

Senator LaFollette of Wisconsin, who presented the legislation to the Senate, made this absolutely clear by answering "certainly" when asked whether the Valuation Act's ultimate purpose was "the equitable adjustment of rates." 49 Cong. Rec. 3800. Indeed, this Court has recognized that the public purpose goal of Congress in enacting § 19a looked for "an accuracy that will make an advance upon previous uncertainty." *ICC v. New York, N.H. & H.R.R. Co.*, 287 U.S. 187, 205 (1932). Similarly, in explaining the effect of a final valuation, the late Senator said it would be final "to the extent it is *prima facie* evidence whenever a rate case arises," 49 Cong. Rec. 3799.

In spite of the above, once having found a Congressional intent in 1906 to apply the same ratemaking principles to oil pipelines as then applied to *other common carriers*, the Court of Appeals then made a wholly unwarranted leap in logic by transferring to 1906 common carrier regulation the "established ratemaking principles" it claims to have found in *Mobil Oil*, and other non-common carrier cases (App. A-33). Nothing in the cases cited in the court's opinion, nor in the legislative history relied upon by the court, warrants any such conclusion. There is a great deal, however, to support a conclusion quite different from that of the Court of Appeals. As previously noted, the Hepburn Act was passed not at a time of original cost ratemaking but of fair value ratemaking, and passage of the Valuation Act codified the Congressional intent that the current value of assets at least be considered in common carrier rate cases.

The court's failure to recognize § 19a of the Interstate Commerce Act and its legislative history cannot be explained away because the Valuation Act was enacted prior to Justice Brandeis' dissent in *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n*, 262 U.S. 276 (1923), and this Court's decision in the *Hope* case, *supra*, because there is substantial evidence of a continuing Congressional intent that oil pipeline valuations be made and used in ratemaking. Evidence of such Congressional intent is found in the history of Congressional actions on appropriations for the operation of the ICC. Over the years, when Congress enacted appropriations legislation for that commission, it regularly included funds for oil pipeline valuation activities. Significantly, in the 1950's, when the then Bureau of the Budget sought to eliminate such funds,[8] the Congress regularly earmarked specific monies for such activities.[9] Then, as now, earmarking was an unusual legislative step. Later, from 1961 to 1968, the ICC itself repeatedly sought to have Congress amend 49 U.S.C. § 19a, expressly proposing such amendments in light of this Court's holdings in *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 586 (1942), and in the *Hope* case, *supra*.[10] The principal change sought by the ICC

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[8] *See*, in particular, Hearings on Independent Offices Appropriations, 1951, of the House Appropriations Committee, 81st Cong., 2d Sess., pt. 3, at 763 (1950); Hearings on Independent Offices Appropriations, 1951, Before the Subcommittee on Transportation of the Senate Appropriations Committee, 81st Cong., 2d Sess., at 794, 805-6 (1950).

[9] Independent Offices Appropriation, 1950, 63 Stat. 631, 654 (1949); General Appropriations Act, 1951, 64 Stat. 595, 710 (1950); Independent Offices Appropriation Act, 1953, 66 Stat. 393, 403-4 (1952); First Independent Offices Appropriation Act, 1954, 67 Stat. 298, 308 (1953); Independent Offices Appropriation Act, 1955, 68 Stat. 272, 284 (1954).

[10] ICC 75th Annual Report 1961 at pp. 188-189; ICC 76th Annual Report 1962 at pp. 199-200; ICC 77th Annual Report 1963 at pp. 18-19; ICC 78th Annual Report 1964 at pp. 66-67; ICC 79th Annual Report 1965 at p. 118; ICC 80th Annual Report 1966 at p. 125; ICC

was one that would make *optional* the requirement that the Commission keep itself informed of changes in the quantity of the property of carriers, following the completion of the original valuation. Such ICC proposals were introduced in three different Congresses, but were never adopted.[11]

The Congressional action on the ICC's legislative proposal in the 90th Congress is particularly instructive. The Senate Commerce Committee—the ICC's substantive law committee—reported out the ICC's proposed legislation on July 9, 1968 with a proposed amendment, as described and supported in its Report, as follows:

> The Committee amendment to S. 757 would specifically retain the *mandatory requirements of Section 19(f) with respect to oil pipeline companies,* and specifically require the Commission to make annual valuations of all oil pipeline carriers as to which initial valuations have been made. *The committee agrees with the Commission as to the importance of oil pipeline carrier valuations and the need for their continuance.* The Commission in two important decisions, 243 ICC 115 (1940) and 243 ICC 589 (1941), affirmed in principle by 258 ICC 41 (1944), held that the tariff rates of a crude oil pipeline which produced earnings which do not exceed 8 percent of the Commission's valuation of that line are just and reasonable, and that the tariff rate of a pipeline transporting refined products which produce earnings that do not exceed 10 percent of the Commission's valuation of that line are just and reasonable.
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> In addition, the oil pipeline valuation reports of the Commission make it possible for shippers to readily

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81st Annual Report 1967 at p. 119; ICC 82d Annual Report 1968 at p. 129.

[11] 87th Congress, 2d Session, H.R. 12249 and S. 3420; 88th Congress, 1st Session, H.R. 5247 and S. 1149; and 90th Congress, 1st Session, H.R. 6535 and S. 757.

> determine the pipeline carriers' rate of return, and the committee is advised that only a relatively small number of pipeline rate cases have come to hearing before the Commission.
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> * * * *
>
> The committee amendment to S. 757 makes clear the committee's intention that the Interstate Commerce Commission shall continue to compile the necessary information and make annual valuations of pipelines.
>
> *Senate Report No. 1373 to Accompany S. 757 Elimination of Unnecessary Valuation and Reporting Requirements, 90th Cong., 2d Sess.,* July 9, 1968, at pp. 5-6. (Emphasis added.)

Among other things, this report makes clear the Senate Committee's full awareness and endorsement of the ICC's oil pipeline regulatory approach, including the Commission's use of Section 19a valuations. Consistent with the Committee's Report, Congress did not enact the ICC's proposed legislation; oil pipeline valuations have continued to be required on a current basis and the funding thereof has stayed intact to this day. Thus, the required use of oil pipeline valuations to determine the present value of their properties has been left legislatively unchanged, even in the face of repeated recommendations for change by the ICC itself.

Further evidence of this continuing Congressional approval of the method of oil pipeline regulation is found in the fact that while Congress has changed the standards in the Interstate Commerce Act for railroad rate-making over the years, it was careful, both before and after the creation of FERC, to limit such action so as not to include oil pipelines within the scope of such amendments. *See, e.g.,* 49 USC §§ 15 and 15a and as amended, codified, and repealed, and the Staggers Rail Act of 1980, Public Law 96-448, 96th Cong., Oct. 14, 1980, 94 Stat. 1895.

Thus, there is substantial legislative history, none of which was even considered by the Court of Appeals,

showing it to be the continuing intent of Congress that a light rather than a heavy regulatory hand be applied to this industry,[12] and that the approach used be one that gives substantial weight to value considerations.

In its analysis of legislative history, the Court of Appeals also criticized FERC for relying on the "climate of opinion" prevalent at the time of the Hepburn Act's passage to support FERC's interpretation of the just and reasonable standard (App. A-35). Yet, as to this specific Act, this Court has said that the circumstances existing at the time were not to be ignored and has stated what it considered to be the Act's purpose. In *United States v. Champlin Refinery Co.*, 341 U.S. 290 (1951), a case not even cited by the Court of Appeals, this Court described the Hepburn Act's purpose as follows (341 U.S. at 297):

> *The statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent.* The circumstances and the evil are well-known. Pipelines were few in number and heavily concentrated under the control of one company, Standard Oil. That company, through the ownership of subsidiaries and affiliates, had "made itself master of the only practicable oil transportation between the oil fields east of California and the Atlantic Ocean and carried much the greater part of the oil between those points . . . availing itself of its monopoly of the means of transportation [it] refused through its subordinates to carry any oil unless the same was sold to it or to them . . . on terms more or less dictated by itself." [Citation omitted] Small independent producers—who lack

[12] As this Court has recently held as to the Natural Gas Policy Act of 1978, given a comprehensive scheme of less regulation, Congress would have clearly itemized any elements of regulation which it had intended to be excluded from such a lighter pattern. *See*, Public Serv. Comm'n v. Mid-Louisiana Gas Co., —— U.S. at ——, 103 S.Ct. at 3034.

> the resources to construct their own lines, or whose output was so small that a pipeline built to carry that output alone would be economically unfeasible—were in a desperate competitive position. *There is little doubt, from the legislative history, that the Act was passed to eliminate the competitive advantage which existing or future integrated companies might possess from exclusive ownership of a pipeline* (emphasis added).

This decision is particularly significant because it substantiates the FERC's reasoning as to the purpose of the Hepburn Act, which was dismissed out of hand by the Court of Appeals (App. A-35).

The utter failure of the Court of Appeals to consider the manifest Congressional intent and purpose violates holdings of this Court in several additional respects. First, such failure violates this Court's directive that ". . . if the statute provides a formula, the agency is bound to follow it." *National Association of Greeting Card Pubs. v. USPE*, —— U.S. ——, 103 S.Ct. 2717, 2728 (1983), citing *American Commercial Lines, Inc. v. Louisville & N.R.Co.*, 392 U.S. 571, 590-93 (1968) and *Colorado Interstate Co. v. FPC*, 324 U.S. 581, 589 (1945). Section 19a certainly provides a formula. Second, it ignores the rulings of this Court that a consistent administrative interpretation, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the agency's interpretation has Congressional approval.[13] *Bob Jones University v. United States*, —— U.S. ——, 103 S.Ct. 2017, 2033 (1983); *Haig v. Agee*, 453 U.S. 280, 291-300 (1981); *Udall v. Tallman*, 380 U.S. 1, 17-18 (1965). Third, as previously noted, it places a burden on, and a directive to FERC

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[13] Had FERC itself chosen to depart from the traditional use of a valuation rate base, any such change would have had to carry with it a cogent degree of proof, one that is not even suggested to have been met on the record. *See* Motor Vehicle Manuf. Assn. v. State Farm Mutual, —— U.S. ——, ——, 103 S.Ct. 2856, 2869 (1983).

so plainly biased in favor of original cost ratemaking that the "end result" principle of the *Hope* case, *supra*, would be totally vitiated. Fourth, the Court of Appeals' action is contrary to this Court's explicit directives concerning the broad discretion to be accorded administrative decisions, and emphasizing the limited scope of judicial review. *See Baltimore Gas and Electric Co. v. NRDC*, —— U.S. ——, 103 S.Ct. 2246 (1983), *reaff'g Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) which held that courts generally lack the authority to impose "hybrid" procedures greater than those contemplated by the governing statutes.

To the same effect, this Court had occasion in a recent decision to remind the same Court of Appeals of the different roles of the judiciary and administrative agencies in matters of regulation. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, 52 LW 4845, 4853 (June 25, 1984), this Court said:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195 (1978).

The Court of Appeals decision in the present case imposes on FERC, and thereby imposes on the oil pipeline industry, the court's policy choice of the type of regulatory approach to be used. Notwithstanding legislative history, notwithstanding section 19a, and notwithstanding the fact that for many years ratemaking based on value rather than cost concepts was not just a possible ap-

proach but the only allowed approach, the Court of Appeals would bar FERC even from giving any weight to value in its ratemaking approach. To reach that result, the Court of Appeals has written a Procrustean opinion that leaves FERC virtually no room within which to exercise its own judgment on such policy matters, one obviously designed to force FERC to apply the original cost mold to this industry. This is exactly the type of intrusion by the judiciary into policy matters reserved for the political branches that was condemned by this Court in *Chevron.*

III. WILLIAMS HAS BEEN DENIED PROCEDURAL DUE PROCESS BY THE CIRCUIT COURT'S AFFIRMANCE OF THE FERC FINDINGS, WITHOUT NOTICE, THAT THE PURCHASE PRICE WILLIAMS PAID IN 1966 FOR THE GREAT LAKES PIPELINE COMPANY PROPERTIES WOULD NOT BE CONSIDERED FOR RATEMAKING PURPOSES.

The other issue on which Williams seeks review relates to the extent to which the price Williams paid in an arms-length transaction for the acquisition of the physical properties of Great Lakes Pipe Line System in 1966 will be recognized for ratemaking purposes. At the time of the purchase, the ICC had no criteria governing such transfers, nor did either the Interstate Commerce Act or ICC regulation require regulatory approval. No expression by the ICC or FERC as to a regulatory policy on this question was issued until the FERC opinion of November 30, 1982 that is the subject of the present proceedings. In its decision, FERC stated that it would not recognize pipeline purchases, at prices either above or below depreciated original cost, for ratemaking purposes unless the purchaser could meet certain specified criteria (App. B-243; 21 FERC at 61,636). FERC also invited cautious *future* purchasers to seek declaratory orders before proceeding with a transaction (*id.*, n. 406).

Williams injury is that FERC also found, in this generic phase of the case, that Williams' purchase

price in 1966 would not be considered *in any* respect for ratemaking purposes (App. B-243; 21 FERC at 61,636). FERC's error was that this issue—the extent to which Williams' specific purchase price would be considered with respect to *its* rates—was to be dealt with in Phase II of the case and not in Phase I, and that Williams *never* was on notice that the Commission intended to do anything to the contrary.[14] The Court of Appeals in two sentences considered and rejected Williams' due process argument. Again, the Court of Appeals has patently erred. The entire treatment of this issue by the Court of Appeals is as follows (App. A-87, n.78):

> First, Williams argues that FERC gave no notice that the issue was to be discussed in Phase I of the *Williams* proceeding. The record, however, shows that such notice was given and Williams briefed the issue during Phase I, *See, e.g.*, J.A. at 241 (*ALJ's Invitation to Submit Comments on Ratemaking Principles for Oil Pipeline Rate Cases*); *id.* at 4103-08 (Williams Opening Brief in Phase I.)

The record shows no such thing, as even a casual look at the two items relied on by the Court readily demonstrates. Copies of both have been included in the separately bound Appendix, as Appendices F and G. The first of the two documents cited by the Court of Appeals outlines the Phase I issues. Rather than supporting the Court of Appeals' finding of notice, this document supports *Williams'* claim that the purchase price issue in Phase I was the industry-wide issue as to FERC's policy generally and *not* the specific issue of how the Williams purchase of 16 years earlier should be treated in evaluating Williams' rates. In his Invitation to Submit Comments, FERC's Administrative Law Judge stated at the

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[14] No one has ever suggested that Williams was not entitled under the Fifth Amendment to the Constitution, the Interstate Commerce Act (49 U.S.C. § 15(1)), and the Administrative Procedure Act (5 U.S.C. § 554) to a full hearing where issues involving Williams' own rates were specifically being decided.

very outset that Phase I would address "ratemaking principles," and that Phase II would deal with the "application of those ratemaking principles to the five specific [Williams rate] cases consolidated for decision in this proceeding" (App. F-2). In addition, the only specific mention in the document of oil pipeline purchase prices is found at page 2, item D.2.b., where the general treatment of purchase prices for rate base purposes was listed as an issue *only* on the premise that the Commission adopted an "original-cost-minus-depreciation" method (App. F-3) —*which it did not do.* This could by no means be deemed notice of a Williams-specific issue, *a fortiori* where Williams' purchase was made when valuation was the rate base method used.

Nor does the only other reference relied on by the court (Williams' opening brief to FERC) support the court's conclusion. Consistent with the issues set forth by the Administrative Law Judge, Williams' brief shows only argument addressed to the industry-wide issue of the treatment of purchase prices generally, if an original cost approach were to be used, and makes *no* argument as to the ultimate treatment to be accorded the Williams purchase from Great Lakes in evaluating Williams' rates. In fact, the brief specifically noted that issues specific to Williams were to be the subject of separate, future treatment in subsequent Phase II litigation (App. G-5, G-9 to G-10).

Before the Court of Appeals, counsel for FERC essentially admitted that Williams had yet to be heard on this issue. At page 89 of its brief to the Court of Appeals, FERC stated:

> Moreover, now that the Commission has established the general rule, Williams will have the opportunity in Phase II to establish whether it is entitled to an exception.

The only party before the Court of Appeals to argue that Williams had been on notice that its purchase price

would be dealt with in Phase I was the Mid-Continent Shippers, but they were unable to point to any specific notice to that effect. More importantly, the Mid-Continent Shippers' argument to that court was the exact *opposite* of their position on the same issue before FERC's Administrative Law Judge. When FERC's Staff offered an exhibit indicating that Williams' purchase price warranted special consideration, Mr. Twomey, counsel for the Mid-Continent Shippers, objected strenuously to the admission of such an exhibit on the very ground now claimed by Williams, i.e. that Williams' *specific* rate base was not at issue in Phase I. Mr. Twomey stated "that particulars of the rate base for a particular pipeline were not to be the subject of Phase I of this proceeding" (App. H-1). The Presiding Administrative Law Judge agreed. Accordingly, the exhibit objected to was admitted only for limited purposes and not for the purpose of determining Williams' rate base (App. H-3).

Elsewhere in its opinion, the court found Williams to be entitled to be heard in Phase II on whether it falls within the single exception contained in FERC's newly adopted general rule on pipeline transfers (App. A-22, n.34). However, that limited right fell far short of giving Williams, or any other carrier, the right to be heard on whether the newly adopted general rule should be applied to past purchases. It also deprived Williams of the right to show that on other grounds the 1982 rule should not be applied to its 1966 purchase.

It is absolutely clear that Phase I was *not* to deal with the ratemaking treatment of the Williams purchase—as Williams, the Presiding Administrative Law Judge, and counsel for the Mid-Continent Shippers all agreed in the hearings before FERC. The action of FERC in injecting a decision on that single Williams-specific issue into its industry-wide rulemaking decision in Phase I was without basis and contrary to the specific notice of issues its own Administrative Law Judge published and inter-

preted. FERC's action having been wrong, the Court of Appeals' hasty approval of that action was equally wrong. It is imperative that this Court act to restore to Williams the *bona fide* and untrammeled hearing to which it is entitled under the Constitution and applicable statutes.

CONCLUSION

For each of the foregoing reasons, and, more particularly, because of the clear denial of due process of law, the patent conflicts in the decision of the court below with numerous Supreme Court precedents and with manifest Congressional purpose and intent, this Court should grant this Petition for Certiorari.

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August 2, 1984